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LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2014-04]

Changes to Recordation Practices

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office is amending its regulations for the recordation of copyright transfers and other documents. The rule is intended to reduce the amount of time the Office requires to process certain types of documents submitted for recordation and help to alleviate remitter concerns regarding the receipt of documents for processing. To these ends, the revised regulations encourage remitters to include a cover sheet with the documents they submit for processing; allow remitters to submit long title lists in electronic format; and provide remitters with the option to request return receipts that acknowledge that the Office has received a submission.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. Background

On July 16, 2014, the Copyright Office published a Notice of Proposed Rulemaking (“NPRM”) setting forth proposed regulatory amendments designed to speed processing of documents submitted for recordation under section 205 of title 17 of the United States Code. *See* 79 FR 41470. The NPRM encompassed three recommended changes to the Office’s recordation regulations. First, the NPRM proposed amending the regulations to reflect the fact that the Office has created a Recordation Document Cover Sheet (Form DCS) to assist with the processing of documents submitted for recordation under section 205. As the NPRM explained, remitters are not required to use Form DCS unless they are requesting a return receipt, but use of the form is encouraged to facilitate better recordkeeping and communication between the Office and remitters. *Id.* at 41471. Second, the NPRM proposed a rule to permit (but not require) the submission of electronic lists of titles of copyrighted works associated with remitted documents, where such lists include 100 or more titles. *Id.* at 41471-72. The NPRM noted that submission of lengthy title lists in electronic format would speed processing of documents by eliminating the need for manual transcription of titles into the Office’s Public Catalog. *Id.* at 41471. Third, the NPRM specified a procedure by which a remitter could receive a return receipt indicating that the Office had received a document submitted for recordation. *Id.* at 41472.

Five comments were received in response to the NPRM.¹ The Motion Picture Association of America, Inc. (“MPAA”) and Barbara Jones-Binns endorsed the proposed amendments in full, and had no further suggestions.² Author Services, Inc., also

¹ All comments received in response to the NPRM can be found on the Copyright Office’s website at <http://copyright.gov/rulemaking/recordation-practices/docket2014-4/comments/>.

² *See* Motion Picture Ass’n of Am., Inc., Comments Submitted in Response to U.S. Copyright Office’s July 16, 2014 Notice of Proposed Rulemaking (Aug. 15, 2014) (“MPAA Comments”); Barbara Jones-Binns,

supported the proposed rule, but stated it would be interested if, as a “next step,” the Office would “move towards being able to submit the titles of documents electronically for less than 100 titles.”³ Finally, the Recording Industry Association of America, Inc. (“RIAA”) submitted comments that were largely supportive of the proposed rule, but contained three substantive concerns that are addressed in more detail below.⁴

II. Final Rule

No commenter opposed the provisions of the proposed rule relating to Form DCS (section 201.4(b)) or the procedures for obtaining a return receipt (section 201.4(f)). Accordingly, those provisions of the proposed rule are adopted in the final rule without alteration.

With respect to the proposed rule for submission of electronic title lists, commenters universally endorsed the basic approach of allowing remitters to file electronic lists of 100 or more titles, and expressed no concerns regarding the format or submission requirements for electronic title lists. For example, the RIAA “commend[ed] the Office for its proposal” and “agree[d] that [it] should relieve the Office of some of the burden of cataloging recordings of copyright documents involving large numbers of titles and expedite the processing of such documents.” RIAA Comments at 2.

With respect to the suggestion of Author Services, Inc. that the Office consider allowing submission of electronic title lists containing fewer than 100 titles as a “next step,” at this time the Office finds that “electronic submission will prove more efficient

Comments Submitted in Response to U.S. Copyright Office’s July 16, 2014 Notice of Proposed Rulemaking (Aug. 15, 2014).

³ Author Services, Inc., Comments Submitted in Response to U.S. Copyright Office’s July 16, 2014 Notice of Proposed Rulemaking (Aug. 11, 2014).

⁴ Recording Industry Ass’n of Am., Inc., Comments Submitted in Response to U.S. Copyright Office’s July 16, 2014 Notice of Proposed Rulemaking (Aug. 15, 2014) (“RIAA Comments”). The Office received an additional comment regarding return receipts for electronic deposits submitted as part of registration, an issue that is outside the scope of this rulemaking.

only when indexing 100 or more titles,” 79 FR at 41472. This view is based on the fact that, when a document pertains to 100 or fewer titles, the Office can create the basic record of the document and manually transcribe all of the titles in a single sitting, and make the record immediately available in the Public Catalog. As a result, while use of an electronic title list is expected to result in a much shorter turnaround time than manual processing of documents pertaining to 100 or more titles, the same cannot be said with respect to documents pertaining to fewer than 100 titles.

The RIAA offered three substantive comments on the proposed rule for submission of electronic title lists. First, it expressed concern with the rule’s specification that remitters would be legally responsible for errors in the electronic title lists. RIAA Comments at 2-5. Second, it urged the Office to implement a process of quality control checks for electronic title lists. *Id.* at 2. Third, and finally, it suggested that the Office specify a mechanism for correction of errors in electronic title lists. *Id.* at 5. We address each comment in turn.

1. Remitter Responsibility for Inaccuracies in Electronic Title Lists.

The RIAA disagreed with the proposed rule’s specification that remitters would bear the legal consequences of any discrepancies between a paper document and the electronically formatted titles with respect to whether there is effective constructive notice or priority under 17 U.S.C. 205. RIAA Comments at 2-5; *see* 79 FR at 41473. Section 201.4(c)(4)(iii) of the proposed rule stated that the Office will rely on the electronic list of titles for purposes of indexing recorded documents in the Public Catalog and the remitter will bear the consequences of any inaccuracies in the electronic list in relation to the recorded document, including with respect to whether there is effective constructive

notice or priority under 17 U.S.C. 205(c). For example, omission of a title from the electronic list such that the title is not properly indexed may affect the ability to claim that the public had constructive notice with respect to that title, even if the title appears in the paper document. If a title appears in the electronic list but is not included in the paper document that is actually recorded, the paper document will control (79 FR at 41473).

As relevant here, section 205(c) of the Copyright Act provides that recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if . . . the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work . . . (17 U.S.C. 205(c)).

Section 205(d), in turn, states that, as between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer)17 U.S.C. 205(d)).

In its comments, the RIAA argues that the electronic title list rule should not suggest that a remitter's failure to provide an accurate list might deprive the remitter of the legal benefits of recordation as provided under the statutory provisions. RIAA Comments at 3. The RIAA reasons that, by making such a suggestion, the rule could

“punish rights holders who make innocent, inadvertent mistakes in preparing electronic lists in the specified format that are submitted for recordation by suggesting that the electronic lists may take precedence over the underlying original document that is submitted for recordation.” RIAA Comments at 2. The RIAA asserts that such a result would “deprive remitters of their right to constructive notice.” *Id.* Instead, in the RIAA’s view, a remitter should be entitled to the legal benefits of recordation—constructive notice and priority—even if the remitter provides the Office with an inaccurate electronic title list that causes the document to be indexed and cataloged incorrectly. The RIAA asserts that the contents of the recorded paper document must solely determine questions of constructive notice and priority under the Copyright Act. *Id.* at 3-5. According to the RIAA, any other result would “improperly subvert the plain language of the Copyright Act and the intent of Congress.” *Id.* at 2.

As an initial matter, it should be noted that accepting the RIAA’s view would seriously undermine the central aim of the electronic title list rule. As the RIAA acknowledges, the rule is meant to “assist[] the Office in the efficient cataloging of the information contained in the lists.” RIAA Comments at 3. To effectively achieve that goal, the Office must be able to rely upon the electronic title lists for indexing purposes without having to individually review the titles in the electronic list against those in the paper document to identify and correct discrepancies. If, as the RIAA urges, constructive notice and priority as between conflicting transfers cannot be affected by inaccuracies in the electronic list that is intended to serve as the basis for the Public Catalog index, the rule will be in tension with the statutory design. In other words, for the rule to result in the efficient cataloging of documents submitted for recordation, the burden for creating

accurate electronic title lists, and thus the legal consequences for failing to do so, must be on the remitter.

As noted above, section 205(c) provides that constructive notice will attach “only if . . . the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work.” 17 U.S.C. 205(c). This language indicates Congress’s intent that, before constructive notice can attach, the public should be able to find the document by title or registration number through a reasonable search of the Copyright Office’s records. For this reason we do not believe the RIAA’s approach to be aligned with the statutory goal.

Moreover, the language in section 205(c) referencing indexing by the Register of Copyrights must be interpreted in light of section 705(a), which provides that the Register “shall ensure that records of deposits, registrations, recordations, and other actions taken under this title are maintained, and that *indexes of such records are prepared*.” 17 U.S.C. 705(a) (emphasis added).⁵ She is also authorized to establish regulations consistent with the statute “for the administration of [her] functions and duties” under title 17. 17 U.S.C. 702. Thus, the Register may assign the task of indexing to another and issue implementing regulations; her duty is to *ensure* that indexes of records are prepared. Notably, section 705 was amended in 2000 specifically to empower the Register to delegate tasks related to record maintenance and indexing to others outside the Copyright

⁵ See *Wachovia Bank NA v. Schmidt*, 546 U.S. 303, 315-16 (2006) (“[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read ‘as if they were one law.’” (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972))).

Office.⁶ Especially in light of this amendment, allowing remitters to prepare electronic title lists that will serve as the basis for the recordation index is fully consistent with congressional intent.⁷

We appreciate the RIAA's concern that remitters are perhaps bearing some additional responsibility and risk by choosing to submit electronic title lists. RIAA Comments at 5. We note that remitters can mitigate their risk by establishing appropriate internal procedures to review and confirm electronic lists before they are submitted to the Office. (Indeed, remitters should already be employing such measures for title lists that are submitted in paper form.) Still, the Office acknowledges that some remitters may not wish to take on the added burden of preparing a careful list in electronic form. In such a case, the remitter may continue to rely on a wholly paper process and manual transcription by the Office. The Office continues to believe, however, that for many remitters, the benefits of faster processing times are likely to outweigh the concerns identified by the RIAA.

Notwithstanding its disagreement with the RIAA's basic position, the Office concurs with the RIAA's views to the extent that the RIAA suggests that it is unnecessary for the rule itself specifically to note potential scenarios where discrepancies in the electronic list may give rise to concerns about notice or priority. Accordingly, the final rule omits the last two sentences of proposed § 201.4(c)(4)(iii), which referenced such scenarios, and revises the preceding sentence to be more general in approach.

⁶ H.R. Rep. No. 106-861, at 5-6 (2000); *see* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 144, 1445. Prior to this amendment, section 705(a) stated that the Register "shall . . . prepare indexes of all . . . records." 17 U.S.C. 705(a) (1999).

⁷ The RIAA also relies on provisions of the Federal Rules of Evidence relating to the introduction of documentary evidence at trial. RIAA Comments at 3-5 (citing Fed. R. Evid. 1001(d); 1002; 1003). While those provisions could be relevant in litigation involving a particular document, they do not govern the interpretation of the Copyright Act by the Copyright Office. *See* Fed. R. Evid. 101 ("These rules apply to proceedings in United States courts.").

2. Quality Control Checks

The RIAA also suggests that the Office “implement a process of quality control checks, particularly during the first year or so after a final rule is promulgated, so that the Office can determine the extent of errors in the submissions of electronic lists.” RIAA Comments at 2. The RIAA notes that “[i]f the rate of such errors is not insignificant, the Office may need to consider modifying the rule in order to minimize such errors.” *Id.*

The Office intends to “spot check” electronic title lists that are submitted, at least for some initial period of time after promulgation of the rule, and plans to communicate with remitters if inaccuracies are found. If the Office discovers an unacceptably high error rate in electronic title lists through these spot checks or otherwise, it will consider appropriate revisions to the rule. Notwithstanding such quality control checks, the Office reiterates that remitters bear full responsibility for ensuring the accuracy of the electronic title lists they submit.

3. Correction of Errors

The RIAA also urges the Office to “provide for a mechanism or procedure by which a remitter can easily correct any errors to the electronic list that the remitter has supplied voluntarily.” RIAA Comments at 5. Specifically, the RIAA urges that “the remitter should be able to correct those errors in a simple, cost-free or low-cost manner,” and that “there should be no time limitation during which a remitter can correct an error.” *Id.*

In light of the potential consequences of errors, and to ensure the most accurate public record possible, the Office agrees with the RIAA that the rule should provide a mechanism for correcting errors in the online Public Catalog that stem from a remitter’s

submission of an erroneous title list. The Office is therefore adding a provision to the rule to permit such corrections. This provision, to be codified at § 201.4(c)(4)(v), would apply after the document has already been processed and catalogued by the Office.

Under the rule, if a remitter discovers an error in the cataloging of a recorded document that is a result of an inaccuracy in the earlier submitted electronic title list, the remitter may submit a corrected title list to the Copyright Office.

To correct the Public Catalog, the original remitter of the recorded document must submit the full electronic list of titles, in the same format as prescribed for the originally submitted list, with each corrected row identified with color highlighting in the table. The table header should contain the phrase “CORRECTED TITLE LIST.” The table header, file name, and label on the storage medium should include the volume and document number of the recorded document to which the corrected list pertains so it can be easily matched to the proper record. A cover letter should also be included that clearly references the volume and document number of the recorded document, the name of the remitting party, the name of the first party listed in the paper document, and the first title listed in the paper document. Once received by the Office, staff will process the necessary corrections so they are reflected in the Office’s Public Catalog. In addition, a note will be placed in the record indicating that corrections were made to the catalog, and the date those corrections were made.

This service will require the establishment of a separate fee.⁸ *See* 17 U.S.C. 708(a) (authorizing the Register to “fix fees for other services . . . based on the cost of providing the service”). But rather than delay the adoption of this final rule in its entirety to allow

⁸ The Office will reexamine the overall fees for recordation, including the impact, if any, of implementation of this rule, during its next fee study. *See generally* 79 FR 15910 (Mar. 24, 2014) (prior fee study).

public comment on such a fee, the Office has decided to issue the rule now and delay imposition of the fee.⁹ Until the applicable fee is finalized through the separate rulemaking proceeding, the fee for submission of corrected title lists will be zero.

4. Technical Changes

Lastly, the final rule includes a few technical changes with respect to the processing of electronic title lists. The rule now specifies that the Office will add a note into the record indicating that it has used an electronic title list submitted by the remitter for purposes of indexing the document. In addition, the final rule includes two clarifications regarding the manner in which registration numbers are to be listed in electronic title lists. First, it specifies that when multiple registration numbers are associated with a title, the registration numbers should be separated by commas. Second, it requires the use of all capital letters for the alphabetic prefixes of registration numbers (*e.g.*, “VAU” not “VAu”).

List of Subjects in 37 CFR Part 201

Copyright.

Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

⁹ In a separate Notice of Proposed Rulemaking, the Office proposes a fee of seven dollars for every title that is being corrected.

2. Amend § 201.4 by revising paragraph (b) and the paragraph (c) heading and by adding paragraphs (c)(4) and (f) to read as follows:

§ 201.4 Recordation of transfers and certain other documents.

* * * * *

(b) *Forms.* Persons recording documents are encouraged, but not required, to complete and include a Recordation Document Cover Sheet (Form DCS), available on the Copyright Office website, with their submissions; provided, however, that if the remitter seeks a return receipt as provided in paragraph (f) of this section, then Form DCS is required. Form DCS may also be used to satisfy the sworn certification requirement of 17 U.S.C. 205(a), as provided in paragraph (a)(3)(i) of this section. If Form DCS is used, two copies of the completed form should accompany each document submitted for recordation, one of which will become part of the public record.

(c) *Document submission contents and process.* * * *

(4) *Submission of electronic title lists.* If a document submitted for recordation pertains to 100 or more titles of copyrighted works (including where the total number of titles across multiple title lists associated with the document is 100 or more), in addition to identifying the titles in the paper submission, the remitting party may also submit an electronic list (or lists) setting forth each such title, as provided herein. The electronic list(s) shall not be considered a part of the recorded document and shall function only as a means to index titles and other information associated with the recorded document. When the Office uses an electronic title list submitted by a remitter for indexing purposes, it will make a note of this fact in the record.

(i) *Method of submitting electronic title lists.* Absent a special arrangement with the Office, the electronic list must be included in the same package as the paper document to be recorded. The list must be prepared in a format consistent with the requirements in paragraph (c)(4)(ii) of this section, and stored on a compact disc, flash drive, or other digital storage medium approved by the Copyright Office that is clearly labeled with the following information: the name of the remitting party, the name of the first party listed in the paper document, the first title listed in the paper document, the number of titles included in the paper document, and the date the remitting party mailed or delivered the paper document.

(ii) *Format requirements for electronic title lists.* Any electronic list of titles submitted pursuant to this paragraph (c)(4) shall conform to the requirements of this subparagraph.

The electronic list of titles shall:

(A) Consist of a table contained in an electronic file in Excel (.xls) format or an equivalent electronic format approved by the Office;

(B) Include only letters, numbers, and printable characters that appear in the ASCII 128-character set;

(C) Include four columns respectively entitled, from left to right, Article, Title, Authorship Information, and Registration Number(s);

(D) List each title on a separate row of the electronic table, and include the following information for each title in the appropriate column, as applicable:

(I) First column: *Article*. If the title of the work begins with one of the articles specified in the following list, the article should be separated from the title and placed in this

column. If the title does not begin with one of the specified articles, the column must still be included, but this field should be left blank. The list of leading articles is as follows:

(i) English: A, An, The

(ii) Spanish: Un, Una, El, La, Lo, Las, Los

(iii) French: L', Le, La, Les, Un, Une

(iv) German: Der, Die, Das, Einer, Eine, Ein;

(2) Second column: *Title*. The title of the work, not including any leading article;

(3) Third column: *Authorship Information*. The word “By” followed by the author or authors of the work. Where applicable, include designations such as “performer known as” or “also known as,” or the abbreviated form of such designations. Abbreviated designations must omit any punctuation between letters, for example “pka” (not “p/k/a”); and

(4) Fourth column: *Registration Number(s)*. The copyright registration number or numbers, separated by commas. This field is optional; if registration numbers are not being supplied for any title in the submission, this column should still be included, but left blank. Regardless of how they appear in the paper document, registration numbers included in the electronic list must be twelve characters long, must include a two- or three-letter prefix in all capital letters, and must not include spaces or hyphens. If a given registration number consists of fewer than twelve characters in the original, the remitting party should add leading zeroes to the numeric portion of the registration number before adding it to the list. For example, a published work with the registration number “SR-320-918” should be transcribed into the electronic list as “SR0000320918,” and an

unpublished work with the registration number “VAu-598-764” should be transcribed into the electronic list as “VAU000598764.”

(iii) *Remitters to bear consequences of inaccurate electronic title lists.* The Office will rely on the electronic list of titles for purposes of indexing recorded documents in the Public Catalog and the remitter will bear the consequences, if any, of any inaccuracies in the electronic list in relation to the recorded document, including with respect to the application of 17 U.S.C. 205(c) and 205(d).

(iv) *Treatment of improperly prepared electronic title lists.* The Office reserves the right to reject an electronic title list from any party that is shown to have submitted an improperly prepared file.

(v) *Correction of erroneous title lists.* If a remitter of a recorded document finds that an error or omission in an electronic title list has led to the inaccurate indexing of the document in the Public Catalog, the remitter may request that the record be corrected by submitting a corrected version of the electronic title list. The remitter must submit the complete, corrected list of electronic titles in accordance with the method and format requirements set forth in paragraphs (c)(4)(i) and (ii) of this section, with each corrected row in the table identified by color highlighting. The table header should contain the phrase “CORRECTED TITLE LIST.” The volume and document number of the associated recorded document should also be included in the header, as well as in the title of the computer file containing the electronic title list. In submitting the list the remitter should include a cover letter that clearly references the volume and document number of the recorded document, the name of the remitting party, the name of the first party listed in the paper document, and the first title listed in the paper document. Upon receipt of a

corrected electronic list in proper form, the Office will proceed to correct the data in the Public Catalog, and will make a note in the record indicating that the corrections were made and the date they were made.

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(f) *Return receipt.* If, with a document submitted for recordation, a remitter includes two copies of a properly completed Recordation Document Cover Sheet (Form DCS) indicating that a return receipt is requested, as well as a self-addressed, postage-paid envelope, the remitter will receive a date-stamped return receipt acknowledging the Copyright Office's receipt of the enclosed submission. The completed copies of Form DCS and the self-addressed, postage-paid envelope must be included in the same package as the submitted document. A return receipt confirms the Office's receipt of the submission as of the date indicated, but does not establish eligibility for, or the date of, recordation.

Dated: September 2, 2014

Maria A. Pallante,
Register of Copyrights

Approved by:

James H. Billington,
Librarian of Congress
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